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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 16

MARY B. JOHNSON,

Petitioner,

vs.

JAMES N. JOHNSON,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA, SPECIAL DIVISION A
and
BRIEF IN SUPPORT THEREOF

KARL F. STEINMANN,
Solicitor for Petitioner.

BERNARD W. RUBENSTEIN,
MANNES F. GREENBERG,
On the Brief.

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JAMES N. JOHNSON,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA, SPECIAL DIVISION A

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Karl F. Steinmann, as attorney for Mary B. Johnson, Petitioner, prays that a writ of certiorari be issued to review the decree of the Supreme Court of the State of Florida entered in the June Term, 1950, of the Court below.

OPINIONS BELOW

The opinion of the Supreme Court of Florida, Special Division A, is set forth in the certified transcript of the record from below; there was no opinion rendered by the lower Court, but the report of the Master is given in toto in the certified transcript of the record from below and directed to this Court.

JURISDICTION

The opinion of the Supreme Court of Florida now in question was rendered on December 12, 1950. The jurisdiction of this Court is invoked under Title 28 U. S. C. A., Section 1257 (3) and Supreme Court Rule 38, Paragraph 5A, in that the Federal Constitutional rights of the Petitioner are herein involved and the Constitutional issue with respect to those rights has been decided by the Supreme Court of Florida in a way not in accord with the applicable decisions of this Court.

QUESTIONS PRESENTED

The questions presented here are:

1. Does an a mensa et thoro divorce decree granted by a Maryland Court to a wife on the grounds of desertion preclude the subsequent consideration of a divorce decree by a Florida Court in favor of the husband based on the same facts and the same issues under Article 4, Paragraph 1 of the United States Constitution?

2. Since the Petitioner's property rights and rights in expectancy dependent upon her marital status are subject to being totally destroyed if the Florida decree remains unreversed, can this Court examine the evidence considered below on the point of residency in order to discover whether there was substantial evidence upon which the lower Florida Court could base its finding of jurisdiction and whether, under the circumstances of this case, the lower Florida Court gave the Petitioner a fair trial as is guaranteed her by the "Due Process" clause of the Federal Constitution Amendment 14?

THE SUPREME LAW OF THE LAND INVOLVED

Herein we contend that the Florida decree is in derogation of the Full Faith and Credit clause of the Federal Constitution, Article 4, Paragraph 1, and the dictates of that clause as are set forth in the cases of *Harding v. Harding*, 198 U. S. 316, and *Thompson v. Thompson*, 226 U. S. 551, and the decree of the lower Florida Court is in derogation of the "Due Process" clause of the Federal Constitution, Amendment 14.

STATEMENT

Mary B. Johnson, defendant in the case of James N. Johnson v. Mary B. Johnson, No. 123455B, filed in Dade County, Florida (R. 1-3), is a resident citizen of the State of Maryland and has been such all her life. The parties are the same as in the Maryland case wherein Mary B. Johnson was Plaintiff and James N. Johnson was Defendant. The said James N. Johnson was, prior to August 2, 1948, a resident and citizen of the State of Maryland, and has since that time variously claimed to be a citizen and resident of Maryland; Reno, Nevada, Charlotte, North Carolina; and of Miami, Florida (R. 250-255).

On the second day of August, 1948, the said James N. Johnson, then residing at 5305 Purlington Way, Baltimore, Maryland, deserted Mary B. Johnson and notified her by telegram from Chicago, Illinois that he was on his way to Reno, Nevada, for the purpose of securing a divorce (R. 21, 35). Desertion on the part of James N. Johnson was of that date found to exist by the Circuit Court No. 2 of Baltimore City, State of Maryland, which granted an a mensa decree to Mary B. Johnson on November 15, 1948 upon her Bill of Complaint previously filed. At the time this Bill of Complaint was filed, the said James N. Johnson

could not be found for service of process in the State of Maryland. Whereupon, the said Mary B. Johnson, pursuant to provision of Article 16, Section 16 as modified in the Public General Law of Maryland and pursuant to the decisions of the Court of Appeals of Maryland, applied for and was granted a receiver to impound the assets of James N. Johnson. James N. Johnson then appeared in the Maryland case, and, sought to dissolve the receivership (R. 38-41).

The decree of the Maryland Court, in deciding that James N. Johnson had without just cause abandoned the said Mary B. Johnson, also made provision for the support and maintenance of Mary B. Johnson and their son, Paul B. Johnson, and enjoined the defendant from disposing of assets located in Maryland (R. 16-19). This a mensa decree, pursuant to the usages and customs of the laws of the State of Maryland, reserves the wife's rights of expectancy in the husband's property upon his death and entitles her to dower in the real estate of her husband if he predeceases her and further entitles her to apply to the Court from time time to time for such alteration in the rights of support and maintenance as the circumstances of the parties warrant at the time of the application.

The lower Court in Maryland filed no opinion and the case was not appealed. A copy of the Maryland decree appears in the certified transcript of the record from below (R. 16-19).

Immediately upon the entry of the Maryland decree, the said James N. Johnson returned to Reno, and on November 18, 1948, three (3) days following the decree of the Maryland Court, signed a Bill of Complaint in Reno and made affidavit "that for more than six (6) weeks next preceding the commencement of this action the plaintiff has

been and now is a bona fide resident and domiciled within the County of Washoe, State of Nevada, and that he has been actually, physically, and corporally present in said county and state during all this time." (R. 247, 250).

On March 29, 1949 the said James N. Johnson filed a Bill of Complaint in Miami, Florida (Dade County) (R. 1-3), and therein made affidavit that the "plaintiff is a bona fide resident of Dade County and has resided in Dade County, Florida, for more than ninety (90) days next preceding the filing of this bill for divorce". Thus, this affidavit would place his residence in Florida as of December 29, 1949. In fact, the said James N. Johnson filed a declaration of domicile and citizenship on December 31, 1948 asserting that he has been a bona fide resident of the State of Florida since December 28, 1948 (R.-53). However, on December 30, 1948 the said James N. Johnson dismissed the Bill of Complaint which had been filed in Reno, Nevada on November 18, 1948. Hence, it will be noted that there is a conflict of date of residence in the papers filed in Miami, and of the date of dismissal of the Reno paper, which occurred while claiming to be a resident of Florida in the statutory period.

In any event, there can be no reconciliation between his testimony that he was a resident of Maryland on October 29, 1948 (R. 117, 236), and his affidavit filed in Reno on November 18, 1948 that he had been a resident of Reno six (6) weeks prior to that date and had been corporally present in Reno when he testified in Maryland on November 29, 1948.

The said Mary B. Johnson appeared by attorneys in the Florida case principally to claim that the proceedings in the Maryland Court was a bar to the action in the Florida Court and contended that the Maryland decree was entitled to

Full Faith and Credit under Article 4, Paragraph 1 of the Constitution of the United States, and hence, that the decree of the Florida Court must be in favor of the said Mary B. Johnson (R. 14-51). The said Mary B. Johnson denied the bona fide residence of the said James N. Johnson and the allegations of misconduct made by the said James N. Johnson which he claimed amounted to constructive desertion and mental cruelty. No fact alleged or proved by Johnson post-dated the Maryland decree.

The case was referred to the Master for the taking of testimony. Except for the evidence relating to Florida residence, all of the evidence that was presented by the said James N. Johnson was properly before the Maryland Court. All the evidence given before the Master related to the conduct of the parties while cohabitating and, hence, to a time prior to the Maryland decree (R. 288-296). The finding upon this evidence of the Maryland Court as to which party was at fault was asserted to be entitled to Full Faith and Credit, precluding the Master from making a contrary finding upon the evidence.

The issues which the said James N. Johnson raised in the Florida proceedings were necessarily decided by the Maryland Court. The separation which the said James N. Johnson claimed in the Florida proceedings to be the fault of Mary B. Johnson was the exact same separation that Mary B. Johnson had based her action in the Maryland Court, which found James to be the party who was at fault for the separation. Furthermore, in order to find as it did, the Maryland Court had to necessarily determine that the said Mary B. Johnson was free of fault, and, thus, free of constructive desertion; for under the Maryland law, she is only entitled to an a mensa divorce if she is free of cruelty, desertion, actual or constructive, and free of vicious conduct.

Your Petitioner, the said Mary B. Johnson, strenuously argued before the Master that the Maryland decree was entitled to Full Faith and Credit and precluded any other determination that went behind the date of that decree. She argued the Maryland decree was res judicata, under the Full Faith and Credit clause of the Federal Constitution, on all of the issues before the Master in the Florida proceedings. However, the Master declined to pass upon this question of the application of res judicata, except insofar as property rights fixed by the Maryland decree are concerned. He merely made a finding that Johnson was a bona fide resident of Florida and is entitled to an a vinculo divorce on the ground of cruelty. Such decree the Florida lower Court granted. The findings of the Master can be found in a certified copy of the proceedings below, which has been directed to this Court (R. 296-297).

This issue of res judicata was the grounds of appeal to the Supreme Court of Florida, which merely affirmed the action of the lower Court without opinion. It is to be noted that the Circuit Court in Dade County, Florida, filed no opinion as to the application of the res judicata doctrine which your Petitioner herein vigorously contended was a necessary consideration of the Court; and it is to be noted that the Supreme Court of Florida likewise rendered no opinion as to the application of the res judicata doctrine, which should have governed the case in the lower Court, which in turn, was bound by virtue of the Full Faith and Credit clause to follow the Maryland decree in toto.

Further, on information and belief, the said Mary B. Johnson claims that the customs, usages, and laws of the State of Florida require that in order to afford jurisdiction to the Florida Court, the Plaintiff therein must have been domiciled in Florida for a period of ninety (90) days preceding the Bill of Complaint. This ninety (90) day period

of residency gives the State the connection which is required between the State and the marital status in order for the State to affect the marital status. Only upon having this connection can the State act upon the marital status and the property rights dependent therein. If this connection is lacking, any action of the State upon the marital status is a denial of due process of law by State action; as a State court granting a severance of the marital status and affecting the property rights flowing from such status is State action. Therefore, Federal Constitutional rights of the parties as regarding their status and their property are dependent upon whether there exist this necessary connection between the State and the parties. As Constitutional rights depend upon a finding of such connection, the Supreme Court can review the basis of this finding in order to determine whether there was substantial evidence supporting this finding. Your Petitioner contends, as she contended in Supreme Court of Florida, that there was no substantial evidence, as seen by the certified copy of the record of the proceedings below, supporting the finding of the Master as to the issue of James N. Johnson's residency in Florida, and, hence, the jurisdictional requirements needed by the Florida Court were totally lacking; and, hence, the required connection between the State of Florida and the parties was non-existent (R. 286). To allow the decree of the Florida Court to stand and to deny the Petitioner her marital rights when there was not a sufficient connection between James N. Johnson and the State of Florida so as to give the Court jurisdiction over the marital status of the said James N. Johnson and your Petitioner would be an unreasonable denial to your Petitioner, Mary B. Johnson, of her right to due process of law.

Beside destroying Petitioner's rights in expectancy in James N. Johnson's property, your Petitioner's rights to

maintenance and support are rendered uncertain and subject to destruction if the Florida decree is allowed to stand. While granting to James N. Johnson an a vinculo divorce, the Florida decree specifically recognized and upheld the validity and effect of the maintenance and support provision in the Maryland decree. Hence, although the Florida Court recognized your Petitioner's right to continued support and maintenance by her husband, it is unclear whether such right now exists under the Maryland decree or under the Florida decree, or both. If such right merely exists under the Florida decree, it is doubted whether such rights can be enforced in the sister states, including Maryland, as to future payments under such decree. Thus, recognition of the validity of the Florida decree would have the possible effect of defeating your Petitioner's rights in property now under the jurisdiction of the Maryland Court to secure payment of future support and maintenance to your Petitioner. If your Petitioner loses her right to have James N. Johnson's property in Maryland subject to the jurisdiction of the Maryland Court, her means of enforcing her rights to maintenance and support will be seriously curtailed, if not, for all practical purposes, nullified, since it is doubted whether she would have the means of pursuing James N. Johnson from state to state in order to enforce the above right against him or his property.

Again, if the maintenance and support provision is considered as remaining and existing only under the Maryland decree, your Petitioner's right to support will be absolutely destroyed; for under the Maryland law, only a wife who is entitled to a divorce is entitled to alimony; and a wife against whom an a vinculo divorce is granted is not one who is entitled to a divorce in her own right.

In November, 1950, the said James N. Johnson again appeared in the Circuit Court No. 2 of Baltimore City, State

of Maryland, and claimed that the Florida decree is now binding on the Maryland Court, and, therefore, even though the Florida Court decreed that "Nothing in this decree shall be held or construed to relieve the Plaintiff in any manner from complying with the support and maintenance provision of that certain decree rendered by the Circuit Court of Baltimore City, State of Maryland, on the 15th day of November, 1948, in the case of Mary B. Johnson v. James Nelson Johnson, et al, divorce," that the said James N. Johnson is no longer obligated to pay support and maintenance to your Petitioner, Mary B. Johnson. After your Petitioner indicated that she would fully contest the validity of the Florida decree in the Maryland Court, the said James N. Johnson dismissed his petition in the Maryland Court. However, he has said that he will pursue every effort to defeat your Petitioner's status as his wife and her property rights flowing out of that status.

SPECIFICATIONS OF ERRORS TO BE URGED

The Supreme Court of Florida erred:

1. In affirming the ruling which failed to give the Maryland decree, which had decided who was at fault as of the date of that decree, Full Faith and Credit, the Court's action was in direct contradiction to the principles and holdings of the cases of Harding v. Harding, 198 U. S. 316, and Thompson v. Thompson, 226 U. S. 551, which cases present the exact situation as was present in the Florida Court below.

2. In holding by implication without reviewing the evidence that the said James N. Johnson had acquired a bona fide residency in the State of Florida, particularly as it is apparent from the record that the said James N. Johnson has always acted in bad faith in seeking to terminate absolutely his marital status with your Petitioner.

3. In refusing to review the evidence establishing the fact of James N. Johnson's ninety (90) day bona fide residence in Florida. That before the Florida decree can be given any effect, it must affirmatively appear by substantial evidence that the Plaintiff was a bona fide resident of Florida for ninety (90) days; that the Florida Supreme Court, for the purpose of determining whether the Florida decree has any effect within Florida or any effect in the sister states under the Full Faith and Credit clause, must review the record to determine whether there was substantial evidence to establish the necessary residence, since the Florida lower Court cannot sustain its jurisdiction by self-serving finding of jurisdiction unsupported by substantial evidence. Failing to review this evidence, the highest Court of Florida was in error.

REASON FOR GRANTING WRIT

The decision of the Supreme Court of Florida is directly contrary to the Supreme Law of the Land as laid down in the cases of Harding v. Harding, supra, and Thompson v. Thompson, supra. These Supreme Court cases hold unequivocally that an a mensa divorce on the grounds of desertion determines who is the party at fault at the time of the decree and is entitled to Full Faith and Credit in such a manner that no court of a sister state can go beyond that decree in order to relitigate the question of fault, when said question was necessarily litigated in both courts. Because the Supreme Court of Florida has decided the Federal question in a way not in accord with the applicable decisions of this Court, certiorari is certainly indicated and should be granted.

As the Federal Constitutional rights of your Petitioner are herein involved and depend upon the finding of fact that there exists the necessary connection between the State of

Florida and the marital status, which connection is based on the ninety (90) day residency of James N. Johnson, and as there is great doubt whether there was substantial evidence to sustain the finding of the lower Florida Court in this regard, certiorari again is clearly indicated and should be granted by virtue of the principles laid down in *Craig v. Harney*, 331 U. S. 367, and *Pennecamp v. Florida*, 328 U. S. 331, in regard to this Court's right to review the evidence supporting a finding of fact when a Constitutional right depends upon the finding of that fact.

CONCLUSION

Your Petitioner respectfully prays that this Petition of Certiorari should be granted.

Respectfully submitted,

KARL F. STEINMANN,
Solicitor for Petitioner.

IN THE

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No. ____

MARY B. JOHNSON,

Petitioner,

vs.

JAMES N. JOHNSON,

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA, SPECIAL DIVISION A

Karl F. Steinmann, on behalf of Mary B. Johnson, files this Brief in support of her petition for a writ of Certiorari to be directed to the Supreme Court of Florida.

OPINIONS BELOW

The opinion of the Supreme Court of Florida, Special Division A, is set forth in the record of the proceedings below, which record is directed to this Court. There was no opinion rendered by the lower Florida Court, but the report of the Master is given in toto in the record of the proceedings below.

JURISDICTION

The opinion of the Supreme Court of Florida now in question was rendered on December 12th, 1950. In that decision, the Florida Court "has decided a Federal question * * * in a way probably not in accord with applicable decisions of this Court". Specifically, the Florida decision was contrary to the Supreme Court decisions rendered in *Harding v. Harding*, 198 U. S. 316, and *Thompson v. Thompson*, 226 U. S. 551, which set forth the applicable law to the issues as they were before the Florida Court. Hence, the jurisdiction of this Court in granting a Writ of Certiorari in this case is invoked under Title 28 U. S. C. A. Sec. 1257 (3), and under Supreme Court Rule 38, Paragraph 5A.

Also, as property rights and rights in expectancy were, by the Florida decision, destroyed or endangered by destruction without granting your Petitioner her right to "due process of law", the jurisdiction of this court is invoked again under Title 29, Section 1257 (3) U. S. C. A.

STATEMENT OF THE CASE

On March 29, 1949, the Respondent, James N. Johnson, filed a Bill of Complaint in Miami, Florida (Dade County) (R. 1-3), seeking a divorce on the grounds that theretofore the said Mary B. Johnson, your Petitioner herein, secured a divorce in another State to wit, the State of Maryland. Thereafter, Plaintiff amended his Bill of Complaint to include two additional grounds for divorce, extreme cruelty and habitual indulgence by the Defendant, Mary B. Johnson, in a violent and ungovernable temper (R. 4-10). Defendant, Mary B. Johnson, filed her answer to the Bill of Complaint as amended, denying all of its material allegations including the alleged bona fide Florida residence of the Plaintiff (R. 11-13). Subsequently, Defendant, Mary B. Johnson, amended her answer pursuant to Court order to in-

clude therein the defense of res judicata in so far as every issue alleged in the Florida Court was raised and decided by the Maryland Court, which had previously decreed to the said Mary B. Johnson a divorce a mensa et thoro on the grounds of desertion of her husband, James N. Johnson (R. 14-51). Upon the taking of testimony before the Master, it was found that no evidence, except that as relating to James N. Johnson's Florida residency, was produced which concerned happenings subsequent to the date of the Maryland decree. And further, no new issues were raised in the Florida Court, except as to James N. Johnson's Florida residency, than those that were necessarily before and decided by the Maryland Court. In order for the Maryland Court to have granted your Petitioner a divorce on the grounds of her husband's desertion, the Court, under the Maryland law, necessarily had to decide that your Petitioner was absolutely free of fault. It necessarily found that she was free of cruelty, for, if guilty of such conduct, she would have been barred from being granted an a mensa et thoro decree. Also, and further, the Court necessarily found that she was free of "habitual indulgence in a violent and ungovernable temper", for, if guilty of this conduct, she would be considered under the Maryland law guilty of constructive desertion and the party who was the fault of the desertion. Hence, the Maryland decree was res judicata, except as to residency, as to all issues before the Florida Court as the proceedings in Florida were to be nothing more than a redetermination of the issues decided by the Maryland Court. However, the Master made no determination as to the application of the defense of res judicata, except insofar as it related to property rights as determined by the Maryland decree (R. 396). He granted James N. Johnson an a vinculo on grounds of cruelty. Consequently, the Master and the lower Florida Court did not give to the Maryland decree the effect that it was entitled under the Full Faith and Credit

clause. Consequently, the action of the Florida Court was in derogation of the Full Faith and Credit clause of the Federal Constitution.

Further, the Master below found that Mr. Johnson was a bona fide resident of Florida as of December 28th, 1949, merely upon the following evidence:

1. That James N. Johnson opened a bank account with the First National Bank of Miami, on December 27th, 1948, and had made deposits in January, February, April and May of 1949.

2. James N. Johnson filed a Declaration of Domicile and Citizenship on December 31st, 1948, asserting that he has been a bona fide resident of the State of Florida since December 28th, 1948. The Notary Public took his acknowledgement on December 28th, 1948.

3. James N. Johnson obtained a Florida driver's license for 1949.

4. Two witnesses testified as to James N. Johnson's being in Florida since December 29th, 1948 (R. 285-287).

As opposed to this evidence, there was evidence that Mr. Johnson had gone to Nevada in August of 1948 with the intention of filing a suit for divorce against Mary B. Johnson. He signed a bona fide Will designating Nevada as his residence. In October, 1948, he testified, in the suit for divorce brought by his wife, that he was a resident of Maryland (R. 117, 236). On November 18th, 1948, he instituted proceedings in Nevada against his wife, signing an affidavit that he was a resident of Nevada (R. 247, 250). Such affidavit was on record in Nevada until December 30th, 1948, two days after he had declared his intention of being a bona fide resident of Florida. Also, there is evidence that the said James N. Johnson subsequently resided in various

places outside the State of Florida (R. 98-120). It is to be noted that testimony before the Master of the Florida Court was fully marked with inconsistencies and uncertainties.

Hence, we submit that the Master in the lower Court in finding James N. Johnson to be a bona fide resident of Florida for ninety days prior to his filing his Bill of Complaint did not act upon substantial evidence showing such required residency, in light of the previous and subsequent conduct of the said James N. Johnson in trying to defeat in bad faith the property rights of your Petitioner growing out of the marital status. If such substantial evidence was not present, the lower Court had no basis on which to render a divorce decree and thereby effect and directly or indirectly destroy the property rights of your Petitioner. To effect and destroy the property rights of your Petitioner without having jurisdiction over the marital status is denying your Petitioner "due process" of law, since there is no connection between the State Court and the subject matter which it seeks to effect. Hence, we contend the Supreme Court of Florida should have declared the decree of the lower Court null and void, as that decree was rendered before there existed sufficient evidence to sustain its jurisdiction.

If the Florida decree is allowed to stand, not only will your Petitioner's rights in expectancy in James N. Johnson's property be destroyed but also her rights to support and maintenance under the Maryland decree will be subject to destruction, even though the Florida Court incorporated within its decree the Maryland provision for support and maintenance of your Petitioner (R. 305). Your Petitioner does not know whether such provision for support and maintenance falls under the Florida decree, or remains in force under the Maryland decree, or is considered an

order of both jurisdictions. If such provision is now considered as falling alone under the Florida decree, there is great uncertainty whether these provisions can be enforced in Maryland as to future payments. Thus, there is a possibility that the property now within the jurisdiction of the Maryland Court under an injunction granted in favor of your Petitioner to secure her payments under the Maryland support and maintenance provision is to be removed from within the control of the Maryland Court. The said James N. Johnson had filed a Petition to dismiss this injunction but for reasons unknown, voluntarily dismissed his Petition. However, he said he would make every effort to defeat your Petitioner's property rights growing out of the marital status.

Under such circumstances, we submit that it is proper for this Court to also consider the evidence that was presented in the lower Florida Court to establish James N. Johnson's required residency in Florida in order to see if the Florida Court was acting without jurisdiction and thus rendered a decree which is not effective within Florida, or in the sister states under the dictates of the Full Faith and Credit clause.

SPECIFICATIONS OF ERRORS TO BE URGED

The Supreme Court of Florida erred:

1. In affirming the ruling which failed to give the Maryland decree, which had decided who was at fault as of the date of that decree, Full Faith and Credit; the Court's action was in direct contradiction to the principles and holdings of the cases of *Harding v. Harding,* 198 U. S. 316, and *Thompson v. Thompson,* 226 U. S. 551, which cases present the exact situation as was present in the Florida Court below.

2. In holding by implication without reviewing the evidence that the said James N. Johnson had acquired a bona fide residency in the State of Florida, particularly as it is apparent from the record that the said James N. Johnson has always acted in bad faith in seeking to terminate absolutely his marital status with your Petitioner.

3. In refusing to review the evidence establishing the fact of James N. Johnson's ninety day bona fide residence in Florida. That before the Florida decree can be given any effect, it must affirmatively appear by substantial evidence that the Plaintiff was a bona fide resident of Florida for ninety days; that the Florida Supreme Court, for the purpose of determining whether the Florida decree has any effect within Florida or any effect in the sister states under the Full Faith and Credit clause, must review the record to determine whether there is substantial evidence to establish the necessary residence, since the Florida lower Court cannot sustain its jurisdiction by self-serving findings of jurisdiction unsupported by substantial evidence. Failing to review this evidence, the highest Court of Florida was in error.

ARGUMENT

I.

Res Judicata Under the Full Faith and Credit Clause.

We will conclusively demonstrate that the facts and issues in both the Maryland court and the Florida court were identical and that the Florida court, in refusing to recognize the Maryland decree, in favor of Mrs. Mary B. Johnson, your Petitioner, as precluding it from making an adverse determination and in granting a decree in favor of Mr. James N. Johnson, rendered a decree contrary to the facts, holdings, and decisions of the cases of *Harding v. Harding*, 198 U. S. 316, and *Thompson v. Thompson*, 226 U. S. 551,

which laid down the dictates of the Full Faith and Credit clause concerning the recognition by sister states of an a mensa divorce.

That the evidence in both cases was identical, except in so far as the question of Florida residency is concerned, is seen from a glance at the Florida record (CF Master's findings, R. 288-296). All evidence given before the Florida court related to the conduct of the parties while cohabitating and, hence, to a time prior to the Maryland decree. All such evidence was properly before and considered by the Maryland court. The finding upon the evidence of the Maryland court as to which party was at fault was final, and to allow the court of a sister state to upset such a finding would be in complete derogation of the Full Faith and Credit clause of the Federal Constitution.

Further, the issues before both courts were identical. First, the question of who deserted whom at a time prior to the date of the Maryland decree was an issue in both cases. The separation, which James N. Johnson claimed in the Florida court was caused by Mary B. Johnson, was the same separation that Mary B. Johnson based her claim in the Maryland court, which found James N. Johnson to be the party who was at fault for that separation.

As to the issue of cruelty specifically: In order for the Maryland court to have granted an a mensa decree, it had to find that Mary B. Johnson was free from cruelty, as the Maryland court will not grant a divorce where the two parties are equally at fault. A divorce a mensa will not be granted when the plaintiff has been guilty of conduct that would entitle the other party, if innocent, to a divorce. The above rule is also last stated in the case of *Dougherty v. Dougherty*, 187 Md. 21 at p. 30, 48 A. 2d 451:

> "* * * Where it appears that the complainant is guilty of recrimination, it is not only the right, but the duty of the Chancellor to refuse a divorce although the defense of recrimination is not formally pleaded. (Earlier Maryland cases cited). Following the Mosaic and Cannon law, the ecclesiastical courts refused to grant a divorce when the husband and wife were guilty of some offense which constituted a cause of divorce, whether the offenses were similar or not * * * It is clear that a divorce to one of two equally guilty spouses is just as definitely against the provisions and policy of the law as any other divorce which the law forbids."

Also, see *Boyd v. Boyd*, 177 Md. 687, 11 A. 2d 471. Therefore, in granting an a mensa divorce for desertion, the Maryland court by necessary implication decided that Mary B. Johnson was absolutely free of cruelty on her part. Also, cruelty on the part of Mary B. Johnson would make her guilty of constructive desertion (*Kruse v. Kruse*, 179 Md. 657, 22 A. 2d 475) of which the Maryland court found her free. Therefore, the Maryland decree was res judicata on the question of cruelty and entitled to Full Faith and Credit on this point, and as James N. Johnson relied on no subsequent act of cruelty (the finding of such subsequent act of cruelty being almost, if not completely, inconceivable, as the parties were separated), the Florida court had nothing on which to act and nothing on which to pass its decree.

What has been said as to cruelty necessarily applies to violent and ungovernable temper on the part of Mary B. Johnson. Such conduct in Maryland would be considered vicious conduct and grounds for divorce under Article 16, Section 41 of the Maryland Code. Also, such conduct causing the other spouse to discontinue cohabitation would constitute constructive desertion. It is to be noted that the lower Florida court in ruling that Mary B. Johnson had deserted James N. Johnson made a finding, by implication,

that Mary B. Johnson was guilty of constructive desertion. However, the Maryland court found her free of vicious conduct so as to: (1) Render her free of constructive desertion and (2) Render her not guilty on such grounds so as to recriminate her and prevent her from seeking the a mensa divorce that was granted to her.

Thus, even if taking a strict approach to the application of res judicata, we find in the case before us that the issues that were raised in the Florida court were necessarily decided by the Maryland court. The Maryland decree being a final determination of the status of the parties as of its date, must be recognized by the Florida court, as well as any other court, under the Full Faith and Credit clause as res judicata of every issue and matter as to conduct of the parties raised in the subsequent Florida action.

Not only will a review of the authorities which follow demonstrate conclusively that the Maryland decree in question is entitled to Full Faith and Credit and totally precludes a court of a sister state from going beyond that decree, but it will be found that the action taken by the Florida court herein was contrary to the dictates of the Full Faith and Credit clause as already laid down in the cases of *Harding v. Harding* and *Thompson v. Thompson, (supra)*. In *Harding v. Harding, (supra)*, the wife acquired a separate maintenance decree in Illinois by virtue of the husband's consent to the decree of the court, which decree was based on the grounds of desertion. Subsequently, the husband appealed, as the lower court did not expressly recognize the falsehood of the other charges in the bill of complaint. Before this appeal was effected, the husband instituted proceedings in California for divorce on the grounds of willful desertion. The appeal in Illinois was decided against the husband. In the California court the husband introduced some testimony that was taken in the Illinois court. The California

court found for the husband and determined that the wife deserted him without just cause. The Supreme Court of the United States held that the California court had wrongly denied Full Faith and Credit to the Illinois decree. The court said:

> "No principal is better settled than that where a question proper for judicial determination is directly put in issue and finally determined in a legal proceeding by a court having competent authority and jurisdiction to hear and determine the same. Such decision and determination of the question would be final and conclusive upon the parties and their privities and in all future litigation between them in which the question arises, so long as judgment remains unreversed and is not set aside.
>
> "* * * That the issue of willful desertion present in the divorce action was identical with the issue of absence without fault presented in the Illinois maintenance suit, is manifest."

The Supreme Court then cited a Massachusetts court holding that a separation legalized by judicial decree was a conclusive determination that the same separation was not a willful desertion.

In the *Thompson* case the facts were: In September, 1907 H got an a mensa divorce from W in the Virginia court on the grounds of her abandonment in June of the same year. Shortly thereafter W sought an a mensa divorce in the District of Columbia court on the grounds of cruelty and constructive abandonment upon the same facts that were litigated in the Virginia court, in which W did not appear. The Virginia decree was held entitled to Full Faith and Credit and, therefore, is res judicata as to the suit in the District of Columbia. It was said that as the Virginia decree discloses that W was at fault:

> "It is plain that such decree forecloses any right of the wife to have alimony or equivalent maintenance from her husband under the law of Virginia."

In other words, W was precluded from obtaining a divorce with or without alimony provisions on grounds which existed prior to the Virginia decree.

It is to be noted that in the Thompson case that the Virginia limited divorce was held to bar the wife from obtaining an a vinculo divorce in another jurisdiction on nominally different grounds, but which grounds had existed prior to the Virginia decree. These two above Supreme Court cases are the basis of the proposition laid down in 27 C. J. S. 830:

> "A judgment or decree in a divorce suit is conclusive in any state action between the parties as to all the facts directly in issue and actually or necessarily determined therein."

In the Thompson case, the question of cruelty on the part of the husband not only could have been litigated in the Virginia court, but was necessarily in issue as it was necessarily determined that he was free of constructive desertion, and, hence, the wife was subsequently precluded from raising that issue again in the District of Columbia. Hence, the Maryland decree which, as seen above, necessarily determined both the issues of desertion and cruelty, was just as much entitled to Full Faith and Credit in the Florida court as was the Virginia decree in the Thompson case entitled to Full Faith and Credit in the District of Columbia. Being so entitled to recognition under the Full Faith and Credit clause, the Maryland decree absolutely precluded the Florida court from going behind that decree (the Maryland decree) and upsetting it.

Freeman on Judgments (5th Ed.) Vol. 3, P. 2972, Sec. 1142, states the law as follows:

> "A limited divorce is as much entitled to Full Faith and Credit under the Constitution or principles of international comedy as an absolute one. A wife's decree of separate maintenance in another state is conclusive as to every matter adjudicated by it in harmony with the general rules as to what is adjudicated by such decree and its effect in a subsequent suit for divorce. If it is adjudicated that she was not guilty of cruelty, or that he was guilty of cruelty, it is res judicata on this issue. If the decree was on the grounds of abandonment by the husband, it is conclusive of this fact. If he consented to a decree on a stipulation that she was living separately from him on legal causes, this was conclusive in his subsequent suit for divorce in another state. A decree of divorce a mensa in favor of the husband is likewise entitled to the same effect elsewhere as it is where rendered. A decree denying relief in a suit for divorce a mensa is conclusive in a subsequent divorce suit of all issues adjudicated. Thus, a finding against a claim of cruelty is res judicata in the husband's suit for desertion."

We submit with the utmost of certainty that since issues of cruelty and desertion were necessarily decided by the Maryland court, the Maryland decree, being a decree of final determination, must be recognized by Florida as well as every other sister state; and, even upon taking the strict approach to the doctrine of res judicata, i.e., the issues raised in both suit must be identical, the Maryland decree precluded the Florida court from hearing the cause which was before the Florida court and upon which the Florida court granted an a vinculo in favor of James N. Johnson.

There are many cases decided by the highest courts of the various sister states holding to be the law the same principles that are set forth by the authorities given above.

Such cases are too numerous to mention herein, but they are listed in our Brief that was submitted to the Supreme Court of Florida, which Brief will be found in the record from below. However, it is to be noted that among the cases following the above authorities are two recent Florida decisions, viz., *Bagwell v. Bagwell*, 153 Fla. 471, 14 So. 2d 841, and *Gordon v. Gordon*, 160 Fla. 838, 36 So. 2d 774.

Many cases have placed the rationale, by which a first divorce decree bars a second divorce decree upon grounds existing at the time of the first decree, upon the theory of estoppel. This theory merely says that not only are the parties in the first suit barred from again raising the issues litigated in the first suit, but they also are stopped from raising any issue that could have been litigated in the first suit. 27 C. J. S. 829 states the proposition in this manner:

> "A judgment on the merits in a divorce action, when rendered by a court of competent jurisdiction, is a bar to every issue which in fact was or in law might have been litigated therein to a later proceeding upon the same cause between the same parties."

Even putting the proposition in broader terms is 4 A. L. R. (2nd) P. 114, where it is said:

> "Even though the causes of action involved in two successive divorce suits are not the same because the grounds on which the divorce is sought are not the same, the former judgment of the sister state denying a divorce has been held to bar another divorce suit by the same plaintiff where the ground on which the suit is based was available at the time of the prior suits, but was not litigated or determined therein."

This speaks in terms of a dismissal of the first suit purely because the annotation concerns only the effect of a dismissal of the first suit. But, the same holds true when one party

has been granted affirmative relief. The following cases can be cited to support the above proposition: First is the case of *Zuckerburg v. Zuckerburg*, 188 Md. 428, 53 A. 2d 20, wherein a decree was granted on January 11, 1944 in favor of the wife on the grounds of the husband's desertion. In February, 1945 an order was made by the court extending payment of alimony. It was held that this order of February, 1945 was an adjudication that the husband was the party who is guilty of desertion as of the date of that order, February, 1945. The Court said:

> "All questions as to who was responsible for the separation of the parties before February 15, 1945 have been adjudicated in favor of the wife. The Chancellor in the instant case should not have gone behind the decree of Chancellor O'Dunne of February 15, 1945, and the decree of Chancellor Smith of January 11, 1944, to determine who was responsible for this separation up until February 15, 1945. To allow him to do so would allow him to review the decree of Chancellors Smith and O'Dunne, and this cannot be done."

Of course, in this case, only the grounds of desertion were expressly involved in both suits. But, the court went on to say:

> "The mere fact that a wife has obtained a divorce a mensa et thoro from her husband is not by itself sufficient defense to denying a husband a divorce a vinculo matrimonii *from the wife if her actions since the divorce a mensa et thoro are sufficient to entitle the husband to a divorce a vinculo matriomnii.*"

Thus, to entitle the husband, who is in the position of James N. Johnson after the Maryland decree of November, 1948, to a divorce, grounds must exist subsequent to the divorce granted in favor of his wife. This proposition seems to be well settled for the court to have gone into this matter further. Upholding, demonstrating, and acting upon the

theory of estoppel is the case of *Ashman v. Ashman,* (Ark.), 94 S. W. 2d 1033; the wife obtained a separate maintenance decree in Illinois. The husband was subsequently freed from alimony due to the Illinois statute. It is held that the decree still decides who is at fault and bars any subsequent suits on grounds existing prior to the Illinois decree.

Also, there is the case of *Bowen v. Bowen,* 219 Iowa 550, 258 N. W. 883. The wife in 1932 acquired separate maintenance from a court in Illinois. The decree was granted on the grounds of desertion. The husband then filed suit in Iowa. It is held that the Illinois decree was res judicata as it was the policy of the court to have an end to litigation, and the Full Faith and Credit clause requires that effect be given to judgments of sister states that have previously decided the issues brought before the court. It is said that the Illinois decree decided all issues which might have been litigated.

The principle of estoppel as applied to the raising of issues in subsequent court actions was set forth in the early Supreme Court case of *Beliot v. Morgan,* 7 Wall 619, 19 L. Ed. 205, 206, quoting from *Henderson v. Henderson,* 1 Hare 115:

> "* * * In trying this question, I believe I state the rule of the court correctly that where a given matter becomes the subject of litigation, and of adjudication, by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in regard to a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have by negligence, inadvertence, or even accident omitted a part of their case. The plea of res judicata applies, except in special cases, not only to points upon

which the court was required by the parties to form an opinion in pronouncing judgment, but to every point which properly belongs to the subject of litigation, in which the parties, exercising reasonable diligence, might have brought forward at that time.

"A party can no more split up defenses than indivisible demands and present them by piecemeal in successive suits growing out of the same transaction."

In the cases which talk of the theory of estoppel, it is held that the estoppel arises from the Full Faith and Credit clause and that the Full Faith and Credit clause dictates that the decree or judgment of the first state must be given such recognition that a court of a second state cannot go beyond the previous decree or judgment for any purposes of investigation. The decree or judgment of the first state is final and conclusive as to the question of who is at fault at the time that it was rendered and precludes a redetermination of that issue. No court thereafter has the right or the power to hear an alleged cause of action of divorce arising previous to the date of the first decree. Regardless of whether we herein rest on the theory of estoppel or the theory of res judicata, if there be any difference between the two theories, or upon both theories, the Maryland decree granting Mary B. Johnson an a mensa divorce from James N. Johnson must be given Full Faith and Credit and precludes any court of any sister state from hearing and re-adjudicating any cause arising prior to the date of the Maryland decree. The Florida court, hearing and re-adjudicating only causes arising prior to the date of the Maryland decree, heard by the Maryland court, was, therefore, in error.

It would be against the purpose of the Federal Constitution to mold a more perfect union and, more specifically, against the purpose of the Full Faith and Credit clause to

allow the Florida decree to remain in effect. To allow a relitigation on the part of the Florida court in order to effect its own policy without regard to those of the sister states would facilitate the seemingly current trend towards social upheaval as far as marital relations are concerned. It is obvious from past performances, as well as the present one, that the courts of Florida are more concerned with promoting the commercial policy of the state rather than to foster or protect or even govern the marital status of its own citizens. In the case at hand, the Florida court made no bona fide decision, and, apparently, no decision whatsoever, in accordance with the law and policy compelling it to respect the policies of its sister states, which respect is required by the Full Faith and Credit clauses; no attempt was made to give effect to the Maryland decree. The law and policy of Florida, rather than the Supreme Law of the Land, was held supreme. Furthermore, from a glance at the Florida cases, it is apparent that either the Florida courts are confused as to what the law of Full Faith and Credit requires, or disregard it completely. In the recent case of *Gordon v. Gordon*, 36 S. 2d 774 (Florida, 1948), the Florida court held that a dismissal on the merits of a divorce action brought by the wife in a sister state upon the charges of indignities to her person is under the Full Faith and Credit clause res judicata of the issues raised in the wife's suit for a divorce on the grounds of extreme cruelty where the character of the evidence produced is essentially the same as that relied on in the suit in the sister states, and in *Bagwell v. Bagwell*, 14 S. 2d 841, it was said that the identities of facts necessary for the granting of a divorce under the pertinent statutes of the second state "is the test of the identity of the issues." Clearly, under these two cases an entirely different result should have been reached in the Florida court, for, as seen above, the evidence and the

issues were identical in both the Maryland and the Florida courts. The same can be said of the case of *Coleman v. Coleman*, 157 Fla. 471; 26 So. 2d 843, wherein the result when read with the Gordon case and the Bagwell case seems unexplainable. If any explanation were given of the results of the above Florida cases, or if any proposition were to be obtained from an analysis of these cases, that proposition would be solely this: That the Florida court is giving merely lip service to the dictate of the Full Faith and Credit clause, and in a poor fashion at that. Another indication of the correctness of this proposition is the fact that the Supreme Court of Florida rendered absolutely no opinion as to the correctness of the lower court's decree in favor of James N. Johnson, which, in turn, did not even consider any application of the Full Faith and Credit clause. Under these circumstances, it would be detrimental to the harmony which has existed between the states, as well as contrary to the dictate of the Full Faith and Credit clause of the Constitution, to allow the Florida decree in question to stand. Again, we reiterate strong contention that the Florida decree is not only erroneous, but utterly void, as the Florida court had absolutely no power to relitigate the issues which James N. Johnson brought before it, and, therefore, such decree is entitled to no recognition.

The petition for a writ of Certiorari should be granted in order that an affirmative ruling may be made as to the invalidity of the Florida decree.

II.

Review of the Evidence Supporting the Finding of the Jurisdictional Fact.

If the present Florida decision is allowed to stand, your Petitioner's rights in expectancy, dower rights and rights to maintenance and support will be destroyed or subject to

total destruction. Hence, property rights protected by the Due Process of Law clause of the Federal Constitution, Amendment 14, are herein involved. In order for the Florida Court to effect and to cause alteration or destruction of property rights dependant upon marital status, the Florida Court must first acquire adequate jurisdiction over the marital status; for if such jurisdiction is lacking, there is no basis on which the Florida Court can act in order to effect either the marital status or the incidents thereof. The jurisdiction necessary in order that the Court may act is at least the domicile of one party, which domicile may be termed "a jurisdictional fact". As the property rights herein discussed are dependent upon the existence of the necessary jurisdictional fact, this Court can review the evidence supporting the alleged finding of that jurisdictional fact in order to determine whether there was an adequate basis on which the State Court could act in the manner as the Florida Court did below.

That the Petitioner's rights in expectancy and dower will be destroyed if the Florida decision is allowed to stand is obvious. Under the a mensa decree rendered by the Maryland Court, she is still entitled to all rights flowing from the marital status. In *Roberts v. Roberts,* 160 Maryland 513, 154 A. 95, it is said: "A decree of divorce a mensa et thoro does not dissolve the marriage bond, but merely suspends the right of cohabitation, and has no effect on the property rights of either spouse". However, an a vinculo divorce under Maryland law has the effect of not only severing the marital bond, but also destroying the property rights incident to and flowing out of the marital status. In *Crise v. Smith,* 150 Md. 323 at page 326, 133 A. 110, it is said: "It is true that, as a general rule and independent of statute, a divorce a vinculo ends all rights of either spouse dependent on marriage, and not actually vested, as courtesy, dower

and property rights under status of distribution * * *" Hence, the Florida a vinculo in favor of James N. Johnson would defeat the rights in expectancy and dower rights of your Petitioner.

Whether the Florida Court had such power to effect the above change is a question of jurisdictional fact, the finding of which is subject to review upon the evidence by this Court under the cases of *Craig v. Harney,* 331 U. S. 367 and *Pennecamp v. Florida,* 328 U. S. 331. In *Craig v. Harney,* it was said: "In a case where it was asserted that a person has been deprived by a State Court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made". (Cases cited therein). The Court then went on to examine the evidence in order to discover if there was present in that case an infringement on the right of freedom of speech, a right secured by the Constitution. In *Pennecamp v. Florida,* 328 U. S. 331 at page 345, Mr. Justice Reed said this: "While the ultimate power is here to ransack the record for facts in Constitutional controversy, we are accustomed to adopt the result of the State Court's examination. It is the findings of the State Courts on undisputed facts or the undisputed facts themselves which ultimately furnish the basis for our appraisal of clean violation of Federal Constitutional rights". Thus, we have again a recognition that it is within this Court's province to re-examine the evidence when rights protected by the Federal Constitution are in controversy. Mr. Justice Frankfurter's opinion in the Pennecamp case further suggests that a re-examination of the evidence can be made in order to determine the validity of the State Court's findings when a Federal Constitutional right is dependant upon the outcome of said finding. Mr. Justice Frankfurter, in his dissenting opinion in the Craig

case, states: "A state cannot by torturing facts preclude us from considering whether it has thereby denied a Constitutional right".

We herein contend that the lower Florida Court, in finding Mr. James N. Johnson to be a bona fide resident of the State of Florida, tortured the facts so as to find that it could dissolve his marital status with your Petitioner, and destroy her rights incident to that status. The record will show that Mr. Johnson's testimony before the Florida Master was saturated with uncertainties and inconsistencies, and answers in the words: "I don't remember" (R. 110-121). These "I don't remember" 's refer to his attempts to establish a Nevada residence. The evidence relied on by the Master in supporting his finding of Mr. Johnson's bona fide residence is totally inconclusive and extremely meager (R. 285-287). The past conduct of Mr. Johnson in attempting to secure a Nevada divorce and in subsequently traveling from state to state should have alerted the Master to the fact that the Florida divorce sought by Mr. Johnson was not sought in good faith. The evidence of a mere attempt on the part of Mr. Johnson merely to defraud your Petitioner of her marital rights was not even considered by the Master in making his finding. We submit that as the Florida Court, by its decree, destroyed the marital rights of your Petitioner, which rights are protected by the Federal Constitution as property rights, upon a finding unsupported by substantial evidence, this Court can review the evidence presented in the lower Florida Court in order to determine whether the finding of the Master was valid.

Not only will the rights in expectancy and dower be destroyed if the Florida decree is allowed to stand, but also will your Petitioner's rights in maintenance and support be destroyed or subject to complete destruction. As pointed

out in our Petition, we do not know whether the effect of the incorporation of the Maryland provision for the support and maintenance of your Petitioner within the Florida decree has the effect of making that provision part of the Florida decree or whether that provision remains existing under the Maryland decree alone, or whether such provision is to be considered a part of and effective under both decrees. If such provision is to be considered a part of the Florida decree alone and enforceable only under that decree, there is a possibility that the property now under jurisdiction of the Maryland courts to secure your Petitioner in payments of alimony will be removed from the jurisdiction of the Maryland Court, and thus render your Petitioner totally unsecure as to future payments of alimony. This uncertainty arises due to the fact that we do not know whether the Maryland Court will enforce compliance with a support and maintenance provision of an out-of-state court as to future payments under such provision. There is no ruling of the Maryland Court of Appeals on this point, and there are authorities in Connecticut, Massachusetts, New Jersey and other States opposed to the equitable enforcement of future installments of alimony due to the lack of finality of such decree. *German v. German*, 122 Conn. 155 (1936); *Weidman v. Weidman*, 274 Mass. 118; *Kossower v. Kossower*, 142 A. 30 (N. J.); *Grant v. Grant*, 64 App. D. C. 146; *Mayer v. Mayer*, 154 Mich. 386. Hence, if the Maryland Court should rule that it can no longer enforce the support and maintenance provision as to future installments as such provision now falls under the Florida decree and thereby releases the property now held within the jurisdiction of the Maryland Court, Mrs. Johnson's right to alimony as to the future will be rendered for all practical purposes ineffective, as she would then have to pursue the said James N. Johnson from state to state in order to sub-

ject him to continued liability under the support and maintenance provision. Such a burden on your Petitioner would be insurmountable.

If the support and maintenance provision is considered as enforceable merely under and by virtue of the Maryland decree, the Maryland Court, if the Florida divorce is considered valid, will vacate that provision. Under the laws of Maryland, a wife is only entitled to alimony if she is entitled to a divorce. In *Winkle v. Winkle,* 176 Md. 167 at page 169, 4 A. 2d 128, it is said:

> "* * * In order to entitle a wife to such an allowance (alimony), the facts in the case must be such as would entitle her to either a divorce a vinculo matrimonii, or a mensa et thoro, and the court allowing alimony can only do so upon such allegations and proof as would justify a granting of a divorce".

However, a spouse against whom an a vinculo divorce has been granted is no longer entitled to a divorce in her own right, as there is no longer a marital status which can be acted upon. Hence, a woman in such a position is no longer entitled to alimony payments. *Zuckerburg v. Zuckerburg, supra.* In brief, an a vinculo divorce in favor of the husband terminates the husband's liability to make such payments. As the Maryland Equity Court has jurisdiction to modify or vacate an alimony and maintenance provision granted by it, (*Winkle v. Winkle,* 178 Md. 489 at page 501, 15 A. 2d 914), the Maryland Court would, if the Florida decree is considered valid, rescind its support and maintenance provision which it had granted in favor of Mary B. Johnson.

As the property of dower and rights of expectancy are destroyed if the Florida decree is allowed to stand, and as uncertainties exist as to your Petitioner's continued right to support and maintenance, the Petition for a Writ of Cer-

tiorari should be granted in order to determine whether the Florida Court had sufficient jurisdiction over the marital status in question in order to dissolve that marital status and the property rights flowing therefrom.

CONCLUSION

For the reasons assigned above, we submit that the Petition for a Writ of Certiorari filed with this Court should be granted.

Respectfully submitted,

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BERNARD W. RUBENSTEIN,
MANNES F. GREENBERG,
On the Brief.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 16

MARY B. JOHNSON,

Petitioner,

vs.

JAMES N. JOHNSON,

BRIEF OF RESPONDENT JAMES N. JOHNSON IN OPPOSITION TO PETITION FOR CERTIORARI TO SUPREME COURT OF FLORIDA

L. J. CUSHMAN,
Solicitor for Respondent

CUSHMAN, GAY & WOODARD,
On the Brief.

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IN THE

SUPREME COURT OF THE UNITED STATES

MARY B. JOHNSON,
Petitioner,

vs.

JAMES N. JOHNSON,
Respondent.

RESPONDENT'S BRIEF

MARY B. JOHNSON, as Petitioner, seeks Certiorari to review a Judgment of the Supreme Court of Florida (**Johnson v. Johnson, 49 So.(2d) 341**) affirming a decree (R. 302-303) of divorce rendered against her by the Circuit Court of Dade County, Florida.

We are confident that Certiorari should be denied:

FIRST: Because no Federal Question was raised on Appeal to the Supreme Court of Florida.

SECOND: Because the "Full Faith and Credit" clause of the Constitution was never drawn into question before the Supreme Court of Florida, nor by its decision.

THIRD: Because no claim was ever advanced in the State Courts that any rights guaranteed by the 14th Amendment were infringed, and the record affirmatively refutes that contention.

We shall discuss these proposition in the order stated.

I

No Federal Question Was Raised On Appeal To Supreme Court of Florida

Section 1257(3) Title 28 U. S. Code requires that the "right, privilege or immunity * * * under the Constitution" of the United States relied upon to invoke the jurisdiction of this Court "be specially set up or claimed" in the State Court whose decision is sought to be reviewed, before this Court can acquire jurisdiction, and the record must affirmatively show that such right was specially set up or claimed: **BAILEY v. ANDERSON, 326 U. S. 203, 66 S. Ct. 66, 90 L. Ed. 3.** It must affirmatively appear upon the face of the record that the Federal question relied upon to invoke the jurisdiction of this Court was presented in and expressly decided by the State Court, and as Mr. JUSTICE SANFORD declared in **MELLON v. O'NEIL, 275 U. S. 312, 48 S. Ct. 62, 72 L. Ed. 245:**

> "It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature. Dewey v. Des Moines, 173 U. S. 193, 199, 43 L. Ed. 665, 666, 19 Sup. Ct. Rep. 379; Keokuk & H. Bridge Co. v. Illinois, 175 U. S. 626, 634, 44 L. Ed. 299, 302, 20 Sup. Ct. Rep. 205; Whitney v. California, supra."

Petitioner's jurisdictional statement (Petition: p. 2; Brief: p. 14) fails to point to any page of the record where the Federal questions now relied upon to invoke the jurisdiction of this Court, or any Federal question, or claim of right, privilege or immunity under the Constitution

of the United States was ever "specially set up or claimed," in the Supreme Court of Florida, and we shall endeavor to show by the record that no such right, privilege or immunity was "specially set up or claimed" in that Court as required to confer jurisdiction on this Court, and therefore her petition should be denied. The Rules of the Supreme Court of Florida governing appeals provide (Rule 2-c) for filing Notice of Appeal, and (Rule 39) the form of such notice. The procedure for perfecting an appeal is prescribed by Rule 11, paragraph (a) of which provides that: "* * * the appellant shall file with the Clerk of the Trial Court his Assignments of Error * * * *" Paragraph 2(a) of the same rule expressly provides that: "The questions raised or the grounds of appeal * * * as reflected by the Assignments of Error shall control the contents of the record on appeal." Rule 8 expressly provides as follows:

> **"Hearing to be on Transcript and assignment of errors.** No cause shall be heard until a transcript of the record thereof shall be filed in accordance with the rules of this Court, and no assignment of errors will be heard or considered which is not properly based upon the transcript of the record as made up and prepared under rules governing the preparation of transcripts of record."
>
> **Rule 8—Supreme Court Rules of Practice, 30 F.S.A. 25.**

The Supreme Court of Florida is limited on appeal to consideration of Appellant's Assignments of Error, as the Court held in **BRYANT v. GODFREY (Fla.-1949) 40 So.(2d) 833, text 834:**

"In the case of City of Coral Gables, et al., v. State ex rel. Hassenteufel, Fla., 38 So. (2d) 467, 468, we held: 'Limited by the assignments of error, the case on appeal is a review by this Court of the same matter as previously considered and passed on by the lower court. This Court's decision and opinion is on the case as made on appeal and not essentially on 'questions' as framed by counsel.' The questions presented may and can be helpful when they are limited, as they should be, to a direction of our attention to alleged reversible error and are correlated to the assignments of error."

In **RED TOP CAB & BAGGAGE CO. v. DORNER, 159 Fla. 538, 32 So. (2d) 321, text 323,** Mr. Justice Barns, speaking for the Court said:

"The trial judge can only be reversed for the errors presented by the assignments and the brief of appellant of necessity should be addressed to the trial judge's acts of harmful error which should have been presented by the assignments. The brief is in support of the assignments which the appellant by way of argument resolves into 'questions involved.'

* * * *

On appeal such assignments serve as a declaration or complaint against the trial judge and the proof vel non of the assignment is within the record-on-appeal. An appeal without an assignment of error would be similar to a suit without a complaint, bill or declaration.

> The assignments of error and the 'questions involved' should be correlated and it takes at least one assignment to support any such 'questions' ".

Examination of Petitioner's Assignments of Error (R. 307-308), the basis of her appeal, shows that she did not "specially set up or claim" any right or privilege under the Constitution of the United States. The Third exception (R. 307) assigned as error the overruling of Petitioner's exceptions to the Special Master's Report, but examination of those exceptions (R. 298-300) shows that no such claim was specially set up or made even at that time. Thus, it is clear that Petitioner, as Appellant, did not raise either one of the Federal questions relied upon to support her petition for certiorari, and her Assignments of Error (R. 307-308) presented no such questions for adjudication. Counsel for Petitioner, obviously realizing that neither of the Federal questions relied upon in Petitioner's Petition and Brief were raised upon the record upon which the judgment of affirmance by the Supreme Court of Florida (**Johnson v. Johnson, 49 So.(2d) 340**) was based has attempted to repair that fatal omission by having the Clerk of the Supreme Court of Florida transmit to this Court as part of the record on appeal (R. 317-340) the Brief filed on her behalf as Appellant before the Supreme Court of Florida, in which, during the course of the argument, it was claimed that the lower court had failed to give full faith and credit to the Maryland decree. This, however, was not sufficient as the Court pointed out by Chief Justice Hughes, speaking for this Court in **LYNCH v. PEOPLE, etc., 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191:**

"The Court of Appeals of the State affirmed the order of the Appellate Division, but without opinion (263 N. Y. 533, 189 N. E. 684), and the grounds of its decision are left to conjecture. It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise. **Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.**"

We therefore submit that since neither Federal question relied upon to support Petitioner's Application for Certiorari, nor any other Federal questions were presented to the Supreme Court of Florida, the record fails to establish the jurisdiction of this Court to entertain the Petition.

II

The "Full Faith and Credit" clause of the Constitution was never drawn into question before the Supreme Court of Florida, nor by its decision.

The "Full Faith and Credit Clause" (Sec. 1 of Art. 4, Const.) implemented by Sec. 1739 Title 28 USCA, requires that decrees or judgments of one state, shall "have the same faith and credit" in the courts of other states "as they have by the law or usage in the Courts of the State

* * * from which they are taken." Thus, the "faith or credit" which should be given a judgment or decree, depends upon the law of the state where it was rendered. In 3 **Freeman on Judgments 2863**, the author says:

> "The first question to be determined in regard to a judgment of another state, after jurisdictional inquiries have been satisfactorily answered, is, what is its effect in the state whence it was taken? The effect which it has there is precisely the effect which must be accorded it in every other state."

Hence, in the case at bar, **the effect** of the Maryland decree depended upon the law of Maryland, and, as Mr. Justice Gray, speaking for this Court said in **HANLEY v. DONOGHUE, 116 U. S. 1, 6 S. Ct. 242, 29 L. Ed. 535:**

> "Congress has not undertaken to prescribe in what manner **the effect** that such judgments have in the courts of the state in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject.
>
> Upon principle therefore, and according to the great preponderance of authority (as is shown by the cases collected in the margin), whenever it becomes necessary for a court of one State, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact."

Chief Justice WAITE, speaking for the Court in **CHICAGO AND ALTON R. R. CO. v. WIGGENS FERRY CO., 119 U. S. 615, 7 S. Ct. 398, 30 L. Ed. 519,** considering the "Full Faith and Credit Clause" said:

> "Whenever it becomes necessary under this requirement of the constitution for a Court of one state, in order to give full faith and credit to a public act of another state, to **ascertain what effect it has** in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon."

It is the settled rule in Florida that the Courts of Florida do not take judicial notice of the laws of the other states, and that the laws of other states are **facts** to be pleaded and proved like other facts. Thus, in **SAMMIS v. WIGHTMAN, 31 Fla. 10, 12 So. 526,** in an action on a New York judgment, Chief Justice RANEY, speaking for the Court (text 532) said:

> "The laws of our sister states are facts to be pleaded and proved like other facts. Summer v. Mitchell, 29 Fla. 179, 10 South. Rep. 562; Tuten v. Gazan, 18 Fla. 751; Hanley v. Donoghue, 116 U. S. 1, 5, et seq., 6 Sup. Ct. Rep. 242. We do not take judicial notice of them; nor is the view which has been adopted in some states (Paine v. Insurance Co., 11 R. I. 411; State v. Hinchman, 27 Pa. St. 479; Rae v. Hulbert, 17 Ill. 572; Black,

> Judgm. ¶ 860) as ground for taking such notice in cases of the character now before us—that the supreme court of the United States takes the same notice on writs of error to a state court in these cases—correct. It does not take such notice. On the contrary, its doctrine and practice is not to take judicial notice of the law of another state, not proved in the court of the state in which the suit or the judgment was brought and made a part of the appeal record, unless the latter court takes such notice by the local law of that state. Hanley v. Donoghue, supra."

In **COLUMBIAN NAT. LIFE INS. CO. v. LANIGAN, 154 Fla. 760, 19 So.(2d) 67,** SEBRING, J., speaking for the Court (text 70) said:

> "The general rule is that when the law of a foreign state is relied on as governing a given transaction **it must be pleaded and proved as any other issue of fact;** for the local courts will not take judicial notice of it."

and in **UNITED MERCANTILE AGENCIES v. BISSONNETTE, 155 Fla. 22, 19 So. (2d) 466,** in an action in Florida on an Ohio judgment based upon a cognovit note, SEBRING, J., re-stated the rule:

> "It is held in this jurisdiction that a judgment conclusive in a sister state where rendered is conclusive here, under the 'full faith and credit clause' of the Federal Constitution, Art. 4, ¶ 1,

and applicable Federal Statutes. The fact that a judgment of a sister state is of a character or in a form which would not be permissible in a domestic judgment is not of itself a valid ground for refusing it recognition. * * * When, however, such a judgment is brought here for enforcement, the law of the sister state authorizing and making such judgment valid must be shown by pleading and proof by the one who seeks enforcement before the courts of this state will accord it recognition. The courts of this state do not take judicial notice of the law of a sister state even in actions brought here on judgments obtained in another state. Sammis v. Wightman, 31 Fla. 10, 12 So. 526. **Though section 1 of Article 4 of the Federal Constitution requires that full faith and credit shall be given in each state to the judicial proceedings of any other state, the constitutional mandate entails no obligation upon the courts of justice of sister states to judicially know the law of any other state governing the effect of a judgment in controversy. Questions of presumptions or judicial notice are always for the law of the forum. The courts of the forum not being judicially charged with knowledge and hence not bound to take judicial notice of the laws of other states, such foreign laws must be pleaded and proved as ultimate facts,** insofar as it may be necessary to establish the validity of a judgment in the state where rendered. Sammis v. Wightman, supra; Equitable Building & Loan Association v. King, 48 Fla. 252, 37 So. 181; Baggett v. Davis, 124 Fla. 701, 169 So. 372. In the absence of an allegation

of such ultimate facts in the pleadings the presumption will obtain that the law of the sister state is the same as the law of the forum, and the case will proceed to ultimate conclusion upon such presumption. Barnes v. Liebig, 146 Fla. 219, 1 So. (2d) 247; Columbian National Life Insurance Company v. Lanigan, Fla., 19 So. 2d 67. * * * In the case at bar the plaintiff is suing upon a judgment entered in the courts of the State of Ohio. It may be that the State of Ohio permits the entry of judgment rendered under a power of attorney to confess judgment; we do not take judicial notice of such fact. But if the judgment sued upon was entered by such authority, it was rendered in a manner unknown to the jurisprudence of our state."

In **COLLINS v. COLLINS, 160 Fla. 732, 36 So.(2d) 417**, in an action on a New York alimony decree, ADAMS, J., speaking for the Court said:

"There may be found some authority for a court to notice the law of a sister state. See Wigmore on Evidence, 2d Ed., Vol. 5, page 582, Sec. 2573, and Paine v. Schenectady Ins. Co., 11 R. I. 411. But by more than a score of cases covering the entire history of this court and without a single exception we have held consistent with the great weight of authority that foreign law is a fact to be plead and proven. See 20 Am. Jur., Evidence, page 70, Sec. 47; Tuten v. Gazan, 18 Fla. 751; Duke v. Taylor, 37 Fla. 64, 19 So. 172, 31 L.R.A. 484, 53 Am. St. Rep. 232; Cohen v. Cohen, 158 Fla. 802, 30 So. 2d 307; Barnes v. Liebig, 146

Fla. 219, 1 So. 2d 247 and a host of cases in the interim.

We can see no reason at this time to assume the insurmountable burden of ascertaining the statute and case law of each of the several states. If we did, the contention undoubtedly would be made that we should also take notice of the law of each sovereign nation. When the contrary has not been alleged we have assumed the law of the other state to be the same as our own. Our holdings are consistent with settled principles of law and have served the interest of our state well. We shall not extend or depart from them now."

It is likewise the rule in Florida that the Supreme Court on appeal may judicially notice only matters of which the lower Court might have taken judicial notice, **where the source of the lower court's judicial knowledge is incorporated into the record of appeal,** as Chief Justice DAVIS pointed out in **RAMSEY v. McKINNEY, 111 Fla. 387, 149 So. 553:**

"The rule is that an appellate court will take judicial cognizance of any matter of which the court of original jurisdiction might take notice, where the party relying on the judicial knowledge of the lower court has procured and brought into the appellate court's records, the source of the lower court's judicial knowledge. 15 R.C.L. 1063."

15 R.C.L. 1063, cited by the Court states the rule as follows:

> "Appellate Courts—A higher court on appeal will take judicial cognizance of any matter of which the court of original jurisdiction might take notice. But what the original court cannot judicially notice the appellate court cannot notice when sitting in review."
>
> 15 R.C.L. "Judicial Notice"—1063
> Citing, inter alia, Yates v. Milwaukee,
> 10 Wall. 497, 19 U. S. (L. Ed.) 984
> Pennington v. Gibson
> 16 How. 65, 14 U. S. (L. Ed.) 847

The Supreme Court of Florida, in considering an appeal, is confined to the record on appeal, as the Court held in ex parte Powell, 20 Fla. 806:

> "This court on writ of error, will consider only such questions as are presented upon the record of the proceedings in the circuit court. We cannot assume that facts appeared on the hearing below which are not disclosed by the record."

In ALLEN v. TOWN OF LARGO, (Fla.) 39 So.(2d) 549, the court held:

> "Statements made in Appellant's briefs without any support in the record cannot be considered on appeal."

In **HASTINGS v. HASTINGS (Fla.) 45 So.(2d) 115,** the Court held:

> "Where occurrances during proceedings below are not reflected or indicated by the record in a divorce action, bare statements in the brief as to such occurrances will not be considered by the court."

and finally, in **COHEN v. COHEN, 158 Fla. 802, 30 So. (2d) 307, text 309,** Associate Justice CHILLINGWORTH said:

> "When one appeals from the judgment or decree of a trial judge, he impliedly represents harmful error of the trial judge. His client, as well as the appellate court, has a right to consider an appeal such a representation. A record of the proceedings below is presented here to establish such error, and for no other purpose.
>
> The record on appeal is made pursuant to the direction of appellant (as well as appellee), who had the privilege of establishing the proceedings in the lower court by the Judge's certificate, the Clerk's certificate, and, if these fail, there are other means. See 59.15 and 59.16 F.S.A.
>
> The law intends that proceedings before the trial judge might be reviewed here, as they occurred below. When counsel, in oral argument or in brief, attempted to fortify the record on appeal by matters dehors the record, it has a

great tendency to impress the appellate court that the appeal was improvidently taken, and that counsel is unwilling to rely upon the record to establish error. Without further reference to the impropriety of such action, it is evidence of weakness of position, and has a tendency to obscure the presentation of matters which might have merit."

The record on appeal upon which the judgment (**Johnson v. Johnson, 49 So.(2d) 341**) was based (R. 1-314) is devoid of any testimony, evidence or proof whatever, as to the law of Maryland, and hence, under the well settled rule governing appeals in Florida, statements of counsel in Appellant's brief as to the law of Maryland could not supply the lack of **evidence** or **proof** as to the law of Maryland, necessary to enable the Supreme Court of Florida, as an Appellate Court, to make a determination of the effect to be accorded the Maryland decree. The Supreme Court of Florida was therefore, of necessity, left to determine the case under the law of Florida, and the "Full Faith and Credit" Clause was therefore not drawn into question. That being the case, upon the authority of **LLOYD v. MATTHEWS, 155 U. S. 222, 15 S. Ct. 70, 39 L. Ed. 128**, it is clear no Federal question arose upon the appeal. In that case (Lloyd v. Matthews, supra) Chief Justice FULLER, speaking for this Court said:

"The Federal question upon which plaintiff relies to sustain our jurisdiction is that under the statutory law of Ohio, set out in his pleading, the transfer of the stock in question was void, and that the court of appeals of Kentucky in

rendering judgment did not give that full faith and credit to the public acts, records and judicial proceedings of the state of Ohio which the Constitution and the laws of the United States require. Const. art. 4 ¶ 1; Rev. Stat. ¶ 905.

The first error assigned is as follows:

'The court of appeals of Kentucky erred in the decision rendered in this case below, in failing to give full faith and credit to the laws of the state of Ohio which were presented in the pleadings; in failing to give full faith and credit to the judicial construction of such laws by the highest court of said state; and in failing to give full faith and credit to the judicial proceedings of the probate court of Hamilton county, Ohio, as set forth in the pleadings.'

We do not find that the record contains any judicial proceedings of the probate court of Hamilton county, Ohio, but suppose the reference to be to proceedings in insolvency upon the filing of the deed of assignment by Harper, under which Lloyd trustee, claims, and that such insolvency proceedings could have no greater effect on the question of title than allowed by the laws of Ohio in the matter of the preference of creditors.

The court of appeals of Kentucky held that, as the parties all resided in Ohio, and the entire transaction occurred there, its validity was to

be tested by the law in force there; that at common law a debtor had a right to prefer a creditor, either by payment or an express preference in a deed of assignment; that he had a right to pay his debt, and it was only by virtue of statutory law that such a payment could be held invalid and the creditors be compelled to surrender his advantage; that, in the absence of any showing of the existence of such a statute in another state, it must be presumed that the common law was in force there; that section 6343 of the Revised Statutes of Ohio, set out in the pleadings, did not appear 'to embrace a case like this one, but to relate alone to preferences made in deeds of assignment to trustees for creditors generally;' that his transfer could not properly be held to be a part of the deed of assignment; and that, tested by the rules of the common law, the preference was not invalid.

Now, in arriving at these conclusions, the court of appeals did not concur with the views of Harper's assignee, but does it therefore follow that full faith and credit was denied to the laws of Ohio and to the construction of such laws by the highest court of the state? The courts of the United States when exercising their original jurisdiction take notice, without proof, of the laws of the several states, but in the Supreme Court of the United States, when acting under its appellate jurisdiction, whatever was matter of fact in the state court whose judgment or decree is under review is matter of fact there.

And whenever a court of one state is required to ascertain what effect a public act of another state has in that state, the law of such other state must be proved as a fact. Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615 [30:519]; Hanley v. Donoghue, 116 U. S. 1 [29:535].

The court of appeals was obliged to determine the case on the record, and plaintiff in error had failed to plead the construction given the Ohio statutes by the courts of Ohio, or to introduce the printed books of cases adjudged in the state of Ohio, or to prove the common law of that state by the parol evidence of persons learned in that law, or to put in evidence the laws of that state as printed under the authority thereof, or a certified copy thereof, as provided by the law of Kentucky. Ky. Gen. Stat. 1888, chap. 37, p. 546, ¶ ¶ 17, 19.

The court of appeals was left, therefore, to construe the parts of the Ohio laws that were pleaded as it would local laws; and it is settled that, under such circumstances, where the validity of a state law is not drawn in question, but merely its construction, no Federal question arises. As was remarked in Glenn v. Garth, 147 U. S. 360, 368 [37: 203, 206]: 'If every time the courts of a state puts a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it was concluded that the construction was incorrect, it

would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated.' Grand Gulf R. & Bkg. Co. v. Marshall, 53 U. S. 12 How. 165 [13: 938]; Cook County v. Calumet & C. Canal & D. Co. 138 U. S. 635 [34: 1110].

This record contains nothing to show, as matter of fact, that the public acts of Ohio had by law or usage in Ohio any other effect than was given them by the court of appeals of Kentucky. Writ of error dismissed."

Therefore, it is clear that in the case at bar, because of the failure of defendant (Petitioner here) to offer any testimony, evidence or proof as to the law of Maryland, the effect of the Maryland decree was never established, so as to require the Supreme Court of Florida to give that decree any faith, credit or effect to which it may have been entitled under the laws of Maryland, and the Supreme Court of Florida was free to determine its effect under the law of Florida as a question of purely local law, and hence, no Federal question was involved in its decision, and none is presented for consideration in the case at bar.

This Court Cannot Take Judicial Notice of The Law of Maryland in This Proceeding.

We have shown that under the decisions of this Court (Hanley v. Donoghue, supra; Chicago and Alton R.R. Co.

v. Wiggens Ferry Co., supra, and Lloyd v. Matthews, supra) the Supreme Court of Florida was not required by the "Full Faith and Credit Clause" (Sec. 1, Art. 4, Const.) to take judicial notice of the law of Maryland in determining the effect to be given the Maryland decree, and that in the absence of **proof in the record** as to the law of Maryland, statements in Appellant's Brief as to the law of Maryland could not supply the lack of evidence **in the record** necessary to prove the law of Maryland, and that in the absence of such evidence **in the record** the Supreme Court could not consider statements in Appellant's Brief as to the law of Maryland, it follows, under a long line of decisions of this Court, that the Supreme Court of the United States cannot take judicial notice of the law of Maryland. While it is undoubtedly true that this Court does, in many cases, take judicial notice of the laws of all of the states, that is not the rule which applies in a case, like the one at bar, in which this Court is reviewing a decision of a Court which, under the law of the jurisdiction in which it sat, did not do so. This rule was clearly stated by Mr. Justice GRAY in Hanley v. Donoghue, supra, (text 537) as follows:

> "In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every State of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. Course v. Stead, 4 Dall. 22, 27, [4 U. S. bk. 1, L. ed. 724, 726]; Hinde v. Vattier, 5 Pet. 398, [30 U. S. bk. 8 L. ed. 168]; Owings v. Hull, 9 Pet. 607, 625, [34 U. S. bk. L. ed. 246, 252]; United States v. Turner, 11 How. 663,

668 [52 U. S. bk. 13 L. ed. 856, 859]; Pennington v. Gibson, 16 How. 65, [57 U. S. bk. 14, L. ed. 846]; Covington Drawbridge Co. v. Shepherd, 20 How. 227, 230, [61 U. S. bk. 15 L. ed. 896]; Cheever v. Wilson, 9 Wall. 108 [76 U. S. bk. 19, L. ed. 604]; Junction R.R. Co. v. Bank of Ashland, 12 Wall. 226, 230, [76 U. S. bk. 20 L. ed. 385, 387]; Lamar v. Micou, 114 U. S. 218, [ante, 94]. **But on a writ of error to the highest court of a State,** in which the revisory power of this court is limited to determining whether a question of law depending upon the Constitution, laws or treaties of the United States has been erroneously decided by the state court upon the facts before it—while the law of that State, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error—yet, as in the state court the laws of another state are but facts, requiring to be proved in order to be considered, **this court does not take judicial notice of them, unless made part of the record sent up, as in Green v. Van Buskirk,** [supra]. The case comes, in principle, within the rule laid down long ago by Chief Justice Marshall: 'That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and **that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned.**' Talbot v. Seeman [supra.]"

and again by Chief Justice WAITE in **CHICAGO AND ALTON R. R. CO. v. WIGGENS FERRY**, supra (text 522) as follows:

> "This court, and the other courts of the United States; when exercising their original jurisdiction, take notice, without proof, of the laws of the several States of the United States; **but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here.** This was expressly decided in Hanley v. Donoghue, 116 U. S. 1 [Bk. 29, L. ed. 535], in respect to the faith and credit to be given by the courts of one State to the judgments of the courts of another State, and it is equally applicable to the faith and credit due in one State to the public Acts of another."

In **RENAUD v. ABBOTT, 116 U. S. 277, 6 S. Ct. 1194, 29 L. Ed. 629, text 631**, Justice MATTHEWS said:

> "**This court,** upon writ of error to the highest court of a State, **does not take judicial notice of the law of another state, not proved in that Court and made a part of the record sent up,** unless by the local law that court takes judicial notice of it. Hanley v. Donoghue, ante 535."

This is the well settled rule in this Court: See Adam v. Senger, 303 U. S. 59, 58 S. Ct. 454, 82 L. Ed. 649, and note, 655-657. Had petitioner in the case at bar pleaded applicable statutes of Maryland, and applicable decisions of its courts to establish the effect of the Maryland decree in

that state, as the petitioner did in Adams v. Senger, supra, then the "full faith and credit clause" of the Constitution might have been drawn into question by the decision of the Supreme Court of Florida, but she chose not to do so, and further, offered no proof, as the record (R. 1-314) will disclose of either the statutes or decision of Maryland, and since under those circumstances, the Supreme Court of Florida could not take judicial notice of the law of Maryland, it follows that the citations in Petitioner's Brief cannot aid or support her Petition.

III

No claim was ever advanced in the State Courts that any rights guaranteed by the 14th Amendment were infringed, and the record affirmatively refutes that contention.

The record on appeal, which was the basis for the judgment of the Supreme Court of Florida (**Johnson v. Johnson, 49 So. 2d 341**) here sought to be reviewed, fails to reveal that Petitioner, as Appellant, ever claimed, or contended, specifically or otherwise, that she had not been accorded "due Process" in the Florida proceedings. That claim is advanced for the first time in this Court in her petition (p. 7-8; 11-12) and brief (p. 31-37). The basis of that claim or contention in this Court (Petition, p. 7-8; 11-12; Brief, p. 31-37) is that the Florida Courts erroneously decided the issue of jurisdiction adversely to petitioner.

On her appeal to the Supreme Court of Florida, Petitioner, as Appellant, abandoned any conten-

tion that the trial Court had erred in finding against her on the issue of jurisdiction.

It is true that in the Florida proceeding Petitioner challenged the jurisdiction of the Florida Court, and contended (Exceptions R. 299) that James N. Johnson had failed to establish residence required to support jurisdiction, and challenged the decree upon that ground (See: Assignment of Error #2, R. 307) in the Supreme Court, but her counsel chose not to argue that in the Supreme Court of Florida, as examination of her brief on appeal (R. 317-340) will disclose. In **COOK v. CARUTHERS**, 87 Fla. 238, 99 So. 559, the Court held:

> "Under repeated decisions of the Court, assignments of error not argued will be considered as abandoned."

In **MITCHELL v. MASON**, 61 Fla. 692, 55 So. 387, the Court held:

> "Where an assignment of error is not argued in the briefs filed in the appellate court, and is not mentioned in such briefs except in a request to the court contained in such briefs that counsel be permitted to argue such assignment orally before the court, such assignment will be treated as abandoned."

Taylor, J., speaking for the Court (Text: 55 So. 388) said:

"The appellant filed an answer to the bill, to

which the appellee filed divers exceptions, many of which were sustained by the court below, and this order is also appealed from and is assigned as error.

(3) **In his brief filed here the appellant does not argue this assignment,** but as to it simply requests the court to permit him to present his argument thereon orally before the Court. This presentation of an assignment of error we must hold to be an abandonment of the assignment.

Rule 21 of the Rules of Practice for the government of this court expressly provides that each ground of error insisted upon shall be argued and separately presented with the authorities relied upon in support thereof, and provides that a copy of such brief shall be served upon opposing counsel. What notice does opposing counsel have of the points intended to be argued in an oral argument of an assignment of error unless they are set out in the appellant's brief. None whatever. And, besides, to permit an assignment of error to be presented solely by oral argument is in substance doing away with the rule requiring briefs, for, if one assignment can be thus presented, all of them can be with equal propriety, thus eliminating the rule altogether.***"

Thus, the rule, settled by more than a score of decisions of the Supreme Court of Florida, is that an assignment of error not presented and argued by Appellant in his brief is considered abandoned. Hence, in the case at

bar, Petitioner, as Appellant, abandoned her assignment of error challenging the sufficiency of the evidence to support the trial court's finding and decree (Par. (1), R. 302) on the issue of jurisdiction. Having abandoned that challenge in the Supreme Court of Florida, and in effect, having thereby withdrawn that issue from the State Court, she cannot because she is now dissatisfied with its decision, seek review of that question in this court.

The "Due Process" clause does not confer jurisdiction on this Court to review the decree of a state Court upon the mere ground that the State Court erroneously decided an issue properly before it.

The bald contention advanced by Petitioner (Brief: 31-37) is that the Florida Courts erroneously decided the issue of jurisdiction against her, and thereby (it is argued) denied her "due process" guaranteed by the 14th Amendment. If such a contention were sound, every disappointed suitor might with equal propriety seek review in this Court of any judgment against him, upon the plea that the State Court should have decided the facts in his favor. The mere statement of that contention carries its own refutation. In **BONNER v. GORMAN**, 213 U. S. 86, 29 S. Ct. 483, 53 L. Ed. 709, Chief Justice Fuller said:

> "It is firmly established that, when parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the State Courts does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of

the United States (Central Land Co. v. Laidley, 159 U. S. 112, 40 L. ED. 94, 16 Sup. Ct. Rep. 80) * * *"

Mr. Justice Sanford, speaking for the Court in **CORRIGAN v. BUCKLEY**, 271 U. S. 323, 46 S. Ct., 521, 70 L. Ed. 969, said:

> "Mere error of a Court if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law."

We are confident that none of the cases cited by Petitioner announce any such rule as that contended for in the case at bar.

The Record affirmatively refutes any contention that Petitioner was denied due process of law.

The record in the case at bar shows that Petitioner, as defendant in the Florida proceedings was permitted to make a full defence; that the procedure was in strict accordance with the Florida statutatory procedure reviewed in foot notes. To the opinion of Chief Justice Vinson in **SHERRER v. SHERRER**, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429, 1 A.L.R. (2d) 1355. In that case, the Chief Justice, speaking of the sufficiency of the statuatory procedure in Florida in divorce cases as affording litigants due process said:

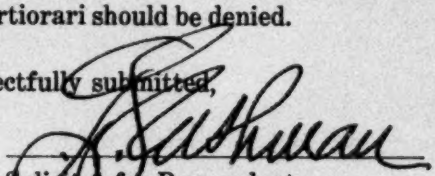
> "At the outset, it should be observed that the proceedings in the Florida Court prior to the entry of the decree of divorce were in no way in-

consistent with the requirements of procedural due process. We do not understand respondent to urge the contrary. The respondent personally appeared in the Florida proceedings. Through his attorneys he filed pleadings denying the substantial allegations of petitioner's complaint. It is not suggested that his rights to introduce evidence and otherwise conduct his defence were in any degree impaired; nor is it suggested that there was not available to him the right to seek review of the decree by appeal to the Florida Supreme Court. **It is clear that respondent was afforded his day in court** with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile. **Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts.** Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 61 L. Ed. 966, 37 S. Ct. 492, (1917); Baldwin v. Iowa State Traveling Men's Assoc. 283 U. S. 522, 75 L. Ed. 1244, 51 S. Ct. 517 (1931)."

Petitioner makes no contention that she was denied a right to make a defence; she makes no claim that the procedure of the state was such as to deny her a right to defend, or such as to spend in any way against the "due process" clause. The record shows beyond doubt that she had her "day in court" — her only complaint is that the decree was against her. There can be no doubt, we respectfully submit, that her contention that she was denied "due process" by the judgment of the Supreme Court of Florida is utterly devoid of merit.

For the reasons assigned, we respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,



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